

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
September 16, 2009 Session

**ELITE EMERGENCY SERVICES, LLC**  
**v.**  
**STAT SOLUTIONS, LLC**

**Appeal from the Chancery Court for Davidson County**  
**No. 07-1501-IV      Russell T. Perkins, Chancellor**

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**No. M2008-02793-COA-R3-CV - Filed March 10, 2010**

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This appeal concerns the denial of a second motion to compel arbitration. The parties entered into a continuing contract that included an arbitration clause. Before entering into the contract, the defendant allegedly made representations about its prior experience. During the first year under the agreement, the defendant allegedly made numerous costly errors in its performance and admitted not having the experience it had previously represented. After continuing to operate under the contract for several months, the plaintiff terminated the contract and filed this lawsuit. The plaintiff alleged, *inter alia*, that the defendant fraudulently induced the plaintiff into entering into the contract. The defendant filed a motion to compel arbitration, which was denied. The parties then engaged in extensive discovery. The defendant filed a second motion to compel arbitration, along with a motion for partial summary judgment on the plaintiff's fraudulent inducement claim. The trial court denied the second motion, and the defendant then appealed. On appeal, the defendant argues that the trial court erred in denying the motion for partial summary judgment and the motion to compel arbitration. The plaintiff argues that this Court lacks subject matter jurisdiction due to the defendant's failure to timely appeal from the denial of the initial motion to compel arbitration. We find that the defendant's failure to appeal the denial of the first motion to compel arbitration does not mean that this Court lacks subject matter jurisdiction. We vacate the trial court's denial of the motion to compel and remand the matter to the trial court for further proceedings on the enforceability of the contract. We dismiss the remaining appeal of the denial of the motion for partial summary judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated in Part and Appeal is Dismissed in Part, and Remanded**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which DAVID R. FARMER, J. and J. STEVEN STAFFORD, J., joined.

Steven A. Riley, Gregory S. Reynolds, and James N. Bowen, Nashville, Tennessee, for the Defendant Appellant, STAT Solutions, LLC

Kenneth R. Jones, Jr. and Janna Eaton Smith, Nashville, Tennessee, for the Plaintiff Appellee, Elite Emergency Services, LLC

## **OPINION**

### **FACTS AND PROCEEDINGS BELOW**

Plaintiff/Appellee Elite Emergency Services, LLC (“Elite”) was founded in 1999 by CEO Samuel Clemmons, M.D. (“Dr. Clemmons”) and his wife Shannon Clemmons (“Mrs. Clemmons”) and her parents Johnny and Brenda Nesmith. Elite provides physician staffing services for emergency rooms in hospitals throughout Tennessee. Elite’s client hospitals retain Elite to provide physicians to staff the emergency rooms. Elite then contracts with individual physicians and assigns the physicians to a client hospital.<sup>1</sup>

In April 2005, on the recommendation of their personal accountant, Dr. and Mrs. Clemmons contacted representatives of Defendant/Appellant STAT Solutions, LLC (“STAT”) to discuss retaining STAT to provide billing services for Elite’s work at the McNairy Regional Hospital (“McNairy ER”). Toward that end, Dr. and Mrs. Clemmons met with STAT’s Director of Healthcare Services, Rhonda Sides (“Ms. Sides”), and STAT’s Billing Administrator, Katherine Abel (“Ms. Abel”). Because billing emergency room services differs considerably from billing other medical services, at the meeting, Mrs. Clemmons asked Ms. Abel if STAT had previously done emergency room billing. Ms. Abel told Elite’s representatives that STAT had performed “every kind of billing there is” and that STAT had a “star” staff member with experience in emergency room billing. Elite opted to retain STAT, based in part on Ms. Abel’s representations of STAT’s prior experience.

On May 13, 2005, Elite and STAT entered into a contract (“Contract”) for STAT to provide billing services for Elite’s work in the McNairy ER. As payment for its services, STAT would receive a percentage of the gross collections. The Contract included an arbitration clause requiring arbitration of disputes arising out of or related to the Contract.

STAT began providing billing services to Elite, pursuant to the Contract, in June 2005. To facilitate the billing process, Elite forwarded to STAT all of its medical records and files. Using this information to prepare bills, STAT directed payers to send payment directly to Elite. Each month, STAT sent Elite a status report on the billing it performed.

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<sup>1</sup>We recite the facts as alleged by Plaintiff/Appellee Elite.

The monthly report identified the patients billed, summarized the amounts collected, and the accounts that remained unpaid.

In September 2005, Elite discovered that the patient billings summarized in STAT's monthly report did not correlate with the number of patients Elite had treated. Other problems began emerging, and over the next nine months, Elite's problems with STAT apparently snowballed.<sup>2</sup>

In July 2006, representatives of Elite and STAT met to discuss Elite's concerns about STAT's performance. In the meeting, Ms. Abel allegedly admitted to Elite that, prior to doing business with Elite, STAT had never performed emergency room billing. In an attempt to assuage Elite's concerns, STAT allegedly agreed to forego some fees and address the issues Elite had raised.

After the meeting, the parties continued doing business under the Contract. Elite, however, continued to be dissatisfied and STAT's performance problems persisted. The parties met again in October 2006, to no avail. In December 2006, Elite finally terminated the Contract with STAT, on the basis that STAT had been grossly incompetent and had made misrepresentations to Elite.

After the termination, pursuant to the terms of the Contract, Elite sought copies of business records held by STAT. In response, STAT demanded that Elite pay STAT a \$20,000 fee for terminating the Contract, as provided for in the Contract. The ensuing correspondence between lawyers for the parties referenced arbitration of the parties' disputes pursuant to the terms of the Contract. However, no arbitration took place.

In July 2007, Elite filed the instant lawsuit against STAT. In its complaint, Elite asserted claims for fraud, negligence, and breach of fiduciary duty based on STAT's performance under the Contract. Elite also asserted a claim for fraudulent inducement, alleging that Ms. Abel had intentionally misrepresented STAT's experience in emergency room billing to Elite in order to induce Elite to enter into the Contract. As relief, Elite sought rescission of the Contract or money damages, as well as injunctive relief to compel STAT to provide records in its possession.

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<sup>2</sup>In its complaint, Elite alleged that STAT misplaced some 1248 medical records, causing it to miss the reimbursement filing deadlines for several claims; that many checks made payable to Elite were returned to sender because STAT provided several insurance companies with an incorrect bank lock box number for payment; and that approximately \$30,000 in checks were made payable to the wrong hospital because STAT provided incorrect service provider numbers in submitting claims for payment. In its amended answer, STAT admitted misplacing some medical files and asserted that it had compensated Elite for this oversight. STAT denied the other allegations.

In response to the complaint, STAT filed a motion to compel arbitration pursuant to the arbitration clause in the Contract. In support of its motion, STAT argued that Elite had elected to affirm the validity of the Contract by continuing to perform under the Contract after it discovered the alleged fraud in July 2006. Consequently, STAT contended, Elite's claim for fraudulent inducement was no bar to compelling arbitration under the arbitration clause in the Contract.

Elite opposed arbitration and asserted that there were disputed issues of fact as to whether Elite had ratified the Contract after discovering STAT's fraud. In support of its contention, Elite filed the affidavit of Brenda Nesmith, in which she stated that after Elite learned of STAT's misrepresentation, "in light of all relevant circumstances, it was not feasible for Elite to terminate the Contract abruptly." She explained that, at the time, STAT had control of Elite's billing and medical records, that Elite did not have the expertise to take over the billing, and that Elite did not know of another qualified billing service provider that could immediately take over the work.

On October 26, 2007, the trial court<sup>3</sup> conducted a hearing on STAT's motion to compel arbitration. No evidence was heard on Elite's fraudulent inducement claim, and apparently neither party requested an evidentiary hearing.<sup>4</sup> On November 5, 2007, the trial court entered an order denying STAT's motion. The order stated:

[I]n light of Elite's fraud in the inducement claim, the court finds that STAT's motion must be denied based on the existing record. The court suggests that the parties may proceed with initial discovery concerning Elite's fraud in the inducement claim, which may allow STAT to determine whether it has grounds to support a motion for summary judgment on that claim.

After the November 2007 order was entered, STAT filed an answer, and later an amended answer with a counterclaim for breach of contract.

Discovery ensued. Over the next year, the parties exchanged written discovery and took the depositions of several witnesses.

On October 17, 2008, STAT filed a "Motion for Partial Summary Judgment and to Compel Arbitration." In the motion, STAT asserted that there were no material facts in

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<sup>3</sup>At this point, the trial judge was Chancellor Richard Dinkins.

<sup>4</sup> The record does not contain a transcript of the hearing.

dispute<sup>5</sup> as to Elite's fraudulent inducement claim and that STAT was entitled to judgment as a matter of law on the claim. If it received a favorable ruling on that argument, STAT argued, it was entitled to an order compelling arbitration of the remaining claims between the parties.

In support of the motion, STAT filed copies of Elite's discovery responses and the depositions of Dr. Clemmons and Mrs. Nesmith. Pointing to this evidence, STAT contended that Elite's fraudulent inducement claim failed as a matter of law for two reasons. First, STAT claimed, Elite's claim relied on parole evidence that contradicted the express terms of the Contract and, second, Elite ratified the Contract by continuing to perform under it after discovering the alleged fraud. Elite's response to STAT's motion<sup>6</sup> noted that STAT had "already unsuccessfully attempted to . . . compel arbitration," and responded to STAT's substantive arguments.

On December 5, 2008, the trial court conducted a hearing on STAT's motion.<sup>7</sup> As with the previous motion to compel arbitration, the hearing was not an evidentiary hearing, and apparently neither party requested an evidentiary hearing.<sup>8</sup> Thereafter, on December 10, 2008, the trial court entered an order denying STAT's motion. The order stated:

[Elite] asserts that, under *Frizzell Construction Co. v. Gatlinburg, LLC*, 9 S.W.3d 79, 84-87 (Tenn. 1999), its assertion of a fraud in the inducement claim precludes the Court from ordering that [Elite's] claims be submitted to arbitration under the terms of the parties' contract.

Upon consideration of the motions, [sic] argument of counsel and the record as a whole, . . ., the Court finds that STAT has not established its right to judgment as a matter of law on [Elite's] fraud in the inducement claim or on [Elite's] right to rescind the parties' agreement based on the alleged fraud.

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<sup>5</sup>For the purposes of the motion, STAT did not dispute that in the April 2005 meeting, Ms. Abel fraudulently misrepresented STAT's experience in doing emergency room billing.

<sup>6</sup>Prior to responding to STAT's motion, Elite filed a cross-motion for partial summary judgment on its fraudulent inducement claim. In response, STAT disputed whether the alleged fraudulent misrepresentation had been made, and filed the affidavit of Ms. Sides in which she stated that neither she nor Ms. Abel had made the alleged misrepresentation at the April 2005 meeting with Elite. On the day before the scheduled hearing on the cross-motions, Elite withdrew its motion for partial summary judgment.

<sup>7</sup>By this time, Chancellor Richard Dinkins had been appointed to the Tennessee Court of Appeals and the trial judge was Chancellor Russell T. Perkins.

<sup>8</sup>The record does not contain a transcript of the hearing.

Based on this finding, the Court holds that [Elite] is not required to arbitrate its claims.

On December 16, 2008, STAT filed a notice of appeal pursuant to Tennessee Code Annotated § 29-5-319(a)(1)<sup>9</sup> and Rule 3 of the Tennessee Rules of Appellate Procedure. The trial court entered an order staying the proceedings pending resolution of this appeal. We now consider STAT's appeal.<sup>10</sup>

#### **ISSUES ON APPEAL AND STANDARD OF REVIEW**

On appeal, STAT raises the following issues:

- 1) Whether the trial court erred by refusing to compel arbitration when the undisputed proof in the record established that Elite's claim of fraudulent inducement was based on alleged pre-contractual misrepresentations that contradict the written terms of the Contract and, therefore, was barred as a matter of law; and
- 2) Whether the trial court erred by refusing to compel arbitration when the undisputed proof in the record established that, after admittedly discovering the alleged fraud, Elite voluntarily and repeatedly continued to perform under the Contract, thereby affirming the enforceability of the Contract and waiving any right to rescind as a matter of law.

Appellee Elite raises the following issue on appeal:

Whether the Court of Appeals lacks subject matter jurisdiction because STAT did not file a timely appeal from the trial court's order denying STAT's first motion to compel arbitration.

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<sup>9</sup>The statute provides in pertinent part:

- (a) An appeal may be taken from:  
(1) An order denying an application to compel arbitration made under § 29-5-303;

T.C.A. § 29-5-319 (2000).

<sup>10</sup>Prior to oral argument, Elite filed a motion in this Court to dismiss the appeal for lack of subject matter jurisdiction. This Court denied Elite's motion to dismiss but noted that Elite was not precluded from addressing the issue in its appellate brief.

Our standard of review over a trial court's denial of a motion to compel arbitration varies "depending upon the nature of the action taken below." **Raines v. Nat'l Health Corp.**, No. M2006-1280-COA-R3-CV, 2007 WL 4322063, at \*6 (Tenn. Ct. App. Dec. 6, 2007), *no perm. app.* In denying the motion to compel arbitration, the trial court reached conclusions of law but made no findings of fact. We review the trial court's conclusions of law *de novo* affording no presumption of correctness. **Nashville Ford Tractor, Inc. v. Great Am. Ins. Co.**, 194 S.W.3d 415, 425 (Tenn. Ct. App. 2005) (citing **Johnson v. Johnson**, 37 S.W.3d 892, 894 (Tenn. 2001); **Nutt v. Champion Int'l Corp.**, 980 S.W.2d 365, 367 (Tenn. 1998); **Hicks v. Cox**, 978 S.W.2d 544, 547 (Tenn. Ct. App. 1998); **McCormick v. Aabakus, Inc.**, 101 S.W.3d 60, 62 (Tenn. Sp. Workers Comp. Panel 2000)). Therefore, in this case, we review the trial court's denial of the motion to compel arbitration *de novo* with no presumption of correctness.

Similarly, "[t]he determination of whether subject matter jurisdiction exists is a question of law." **Herbert v. Bd. of Educ. of Memphis City Schs.**, No. W2008-02383-COA-R3-CV, 2009 WL 4878586, at \*2 (Tenn. Ct. App. Dec. 17, 2009), *no perm. app.* (citing **Northland Ins. Co. v. State**, 33 S.W.3d 727, 729 (Tenn. 2000)).

## ANALYSIS

### Subject Matter Jurisdiction

We must first address the threshold issue of whether this Court has subject matter jurisdiction to hear Elite's appeal. "Subject matter jurisdiction concerns the authority of a particular court to hear a particular controversy." **Meighan v. U.S. Sprint Commc'ns Co.**, 924 S.W.2d 632, 639 (Tenn. 1996) (citing **Landers v. Jones**, 872 S.W.2d 674 (Tenn. 1994)).

Elite argues that this Court does not have subject matter jurisdiction over this appeal because STAT failed to appeal from the order denying STAT's first motion to compel arbitration. Citing **Mitchell v. Owens**, 185 S.W.3d 837 (Tenn. Ct. App. 2005), and **Long v. Miller**, No. E2006-02237-COA-R3-CV, 2007 WL 2751663 (Tenn. Ct. App. Sept. 21, 2007), *no perm. app.*, Elite notes that an order denying a motion to compel arbitration is final and appealable and thus must be appealed within thirty days after the order is entered. Citing **Vest v. Duncan-Williams, Inc.**, No. M2005-00466-COA-R3-CV, 2006 WL 2252750 (Tenn. Ct. App. Aug. 3, 2006), *perm. app. denied* Dec. 18, 2006, Elite contends that a party that fails to timely appeal an order denying a motion to compel arbitration may not revive the issue by filing a second motion to compel. Elite asserts that subject matter jurisdiction is implicated because STAT could not file a second motion to compel arbitration, and therefore this appeal must be considered an untimely appeal of the order denying the first motion to compel arbitration. This Court, of course, lacks subject matter jurisdiction to hear an appeal if the

notice of appeal is untimely. *See, e.g., First Nat'l Bank v. Goss*, 912 S.W.2d 147, 148 (Tenn. Ct. App. 1995).

In *Vest*, the defendant contended that it was a third-party beneficiary of a contract that contained an arbitration agreement. *Vest*, 2006 WL 2252750, at \*1. The defendant filed a motion to compel arbitration pursuant to the arbitration agreement. The motion was denied by the trial court. The denial of the motion to compel was appealed, and the appellate court upheld the denial of the motion on the basis that the defendant had not provided any evidence showing that the arbitration agreement was intended to benefit the defendant. *Id.*

After discovery, the defendant filed a second motion to compel arbitration, attaching affidavits to show that the parties to the contract intended for the defendant to be a beneficiary of it. The trial court denied the second motion to compel, stating that the issue of arbitration could not be reconsidered in the absence of evidence that was not available when the first motion to compel arbitration was filed. *Id.* The defendant appealed again.

On appeal, the Court noted at the outset that, in the first appeal, the appellate court did not vacate the trial court's order and remand for further evidence or proceedings. Rather, the appellate court "reviewed the order denying the motion to compel based on the record presented and affirmed the trial court." *Id.* at \*2. The Court referenced the "law of the case" doctrine, describing it as "a longstanding discretionary rule of judicial practice" that, in general, "prohibits reconsideration of issues that have already been decided in a prior appeal of the same case if the facts are essentially the same." *Id.* (citing *State v. Carter*, 114 S.W.3d 895, 902 (Tenn. 2003)). It noted that the denial of a motion to compel arbitration is a final judgment, appealable as of right. *Id.* at \*3. As the judgment on the first motion to compel arbitration was affirmed and a judgment and mandate were issued, the *Vest* Court found, the judgment of the appellate court "was not subject to revision by the trial court." *Id.* It observed that any attempt to be relieved from that judgment would be governed by Rule 60 of the Tennessee Rules of Civil Procedure. *Id.* Accordingly, the trial court's denial of the second motion to compel arbitration was affirmed.<sup>11</sup>

STAT distinguishes *Vest* in several regards. It first protests that its second motion to compel arbitration in the trial court below was not a "duplicative" motion filed after an unsuccessful appeal; rather, it was filed "as directed" by the trial court after discovery. STAT argues that the denial of its first motion to compel arbitration in the trial court below was not a final order, but was based on unresolved factual issues. In contrast to *Vest*, STAT's second motion to compel was premised on evidence obtained through discovery taken after the first motion to compel was denied.

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<sup>11</sup> *Vest* did not indicate that subject matter jurisdiction was an issue on appeal or before the trial court.

After reviewing *Vest*, we find that it has little applicability in this case. Much of the Court's reasoning in *Vest* was based on the law of the case doctrine, applicable because the denial of the first motion to compel arbitration was appealed and affirmed on appeal. Here, of course, the denial of STAT's first motion to compel arbitration was not appealed; rather, the parties proceeded with discovery related to the enforceability of the arbitration clause.

Moreover, Elite's argument on subject matter jurisdiction in this case is premised on its assertion to this Court that the trial court's denial of STAT's first motion to compel arbitration was a final, appealable order. However, there is no indication in the record that Elite argued to the trial court that the denial of STAT's first motion to compel arbitration precluded STAT from filing a second motion to compel. Instead, Elite argued against the second motion to compel on its merits, a hearing was held, and the trial court decided the motion on its merits. It is apparent that the trial court, and the parties, treated the order denying STAT's initial motion to compel arbitration as an interlocutory order. In that order, the trial court denied STAT's motion based "on the existing record" and suggested that the parties proceed with discovery on Elite's fraudulent inducement claim, which they did. There is no indication that Elite took the position that the order denying STAT's first motion was final and appealable until that argument was asserted in this appeal. As we have observed in previous cases, "the trial judge is in the best position to interpret his own orders." *Mark Pirtle Chevrolet, Inc. v. Celebration Nissan, Inc.*, No. M2002-00554-COA-R3-CV, 2003 WL 21047139, at \*3 (Tenn. Ct. App. May 9, 2003), *no perm. app.* (citing *Richardson v. Richardson*, 969 S.W.2d 931 (Tenn. Ct. App. 1997); *Stidham v. Fickle Heirs*, 643 S.W.2d 324 (Tenn. 1982)).<sup>12</sup> Thus, we gather from the record that the trial court did not view its earlier order denying STAT's first motion to compel arbitration as a final determination on the issue of arbitration. Rather, it implicitly interpreted its prior order as an interlocutory order, to give the parties the opportunity to engage in discovery pertinent to the arbitration issue. Under all of these circumstances, we must respectfully reject Elite's contention that this Court lacks subject matter jurisdiction to hear this appeal. We turn, then, to the issues raised by STAT on appeal.

### **Motion for Partial Summary Judgment and to Compel Arbitration**

The issues raised by STAT in this appeal center on Elite's claim in the trial court below that it was fraudulently induced to enter into the Contract with STAT, based on the alleged fraudulent misrepresentations by STAT representatives about STAT's experience in

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<sup>12</sup>The fact that the trial judge assigned to the case changed in the interim between the first and second order does not affect the application of this principle, because the trial court is in the best position to interpret its own orders "[e]ven [if] the judge has no independent memory of the proceedings." *Richardson v. Richardson*, 969 S.W.2d 931, 935 (Tenn. Ct. App. 1997).

emergency room billing. Elite asserts that the Contract, and therefore the arbitration provision contained in the Contract, is voidable and unenforceable because of STAT's fraudulent misrepresentation. RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981) (stating that a contract induced by a fraudulent misrepresentation is voidable by the recipient of the misrepresentation); *see Guffy v. Toll Bros. Real Estate, Inc.*, No. M2003-01810-COA-R3-CV, 2004 WL 2412627, at \*2 (Tenn. Ct. App. Oct. 27, 2004), *no perm. app.* (citing *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999)). On appeal, STAT asserts that Elite's claim that it was fraudulently induced to enter into the Contract is barred as a matter of law because (1) it is based on parol evidence that is inadmissible to contradict the terms of the Contract, and (2) Elite reaffirmed the Contract after discovering the alleged fraud and waived its right to rescind the Contract based on the fraud.

In its second attempt to obtain an order compelling arbitration, STAT filed a "Motion for Partial Summary Judgment and to Compel Arbitration." Apparently neither party sought an evidentiary hearing on the enforceability of the arbitration agreement, and none was held. The trial court held that Elite's claim of fraudulent inducement "preclude[d]" it from ordering arbitration and found that STAT had "not established its right to judgment as a matter of law" on the enforceability of the arbitration provision, and thus held that Elite "is not required to arbitrate its claims."

It is helpful at this juncture to review the procedure for deciding a motion to compel arbitration where the validity and enforceability of the arbitration provision is questioned. An arbitration agreement is, of course, a contract. Where contract formation issues are raised, such as fraudulent inducement to enter into the contract, the court must determine the validity of the agreement before the arbitration agreement can be interpreted and applied. *See Barclay v. Kindred Healthcare Operating, Inc.*, No. W2008-02828-COA-R3-CV, 2009 WL 2615821, at \*3 (Tenn. Ct. App. Aug. 26, 2009), *no perm. app.* An excellent overview of the appropriate method for doing so is provided by Judge Walter Kurtz in *Raines v. Nat'l Health Corp.*, No. M2006-1280-COA-R3-CV, 2007 WL 4322063 (Tenn. Ct. App. Dec. 6, 2007), *no perm. app.* In *Raines*, a wrongful death case, questions were raised in the trial court regarding the enforceability of an arbitration agreement contained in nursing home admission documents. The trial court treated the motion to compel arbitration as a motion for summary judgment and denied it on that basis. *Id.* at \*2. The appellate court found that the use of a summary judgment standard was erroneous, and outlined in detail the appropriate procedures and standards. *Id.* at \*3.

The *Raines* court noted at the outset that arbitration "is a consensual proceeding in which the parties select decision-makers of their own choice and then voluntarily submit their disagreements to those decision-makers for resolution in lieu of adjudicating the dispute in court." *Id.* (quoting *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142, 149 (Tenn. Ct.

App. 2001)). In Tennessee, arbitration agreements are generally enforceable unless there are grounds for revocation of the agreement. *Id.* (citing *Buraczynski v. Eyring*, 919 S.W.2d 314, 318 (Tenn. 1996)). When one of the parties to the arbitration agreement opposes a motion to compel arbitration, the trial court must decide “certain gateway matters, such as whether the parties have a valid arbitration agreement at all . . .” *Id.* (quoting *Green Tire Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003)). Similar to a motion for summary judgment, resolving these gateway issues frequently requires the consideration of matters outside of the pleadings. *Id.* at \* 4. However, a motion to compel arbitration differs from either a motion to dismiss or a motion for summary judgment, because the trial court must go on to determine whether the arbitration agreement is in fact enforceable before the motion to compel arbitration can be decided. *See id.* at \*4, \*6 (citing *Thompson v. Terminix Int’l Co., LP*, No. M2005-02708-COA-R3-CV, 2006 WL 2380598, at \*4 (Tenn. Ct. App. Aug. 16, 2006)). The *Raines* court then gave a road map for resolving the issues:

In considering opposition to a motion to compel arbitration, a court must distinguish between those arguments attacking the agreement which can be resolved solely as a matter of law and those arguments which require resolution of factual issues. While the former category mirrors a case in which a court is called upon to interpret contractual language and apply it to uncontested facts, the latter requires the trial court to receive evidence and resolve the relevant disagreements before deciding the motion.

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The trial court’s role, then, is not just to determine if there is an issue regarding enforceability. It must also determine if the agreement is in fact enforceable. Even if the party challenging the arbitration agreement interposes such defenses as fraud in the inducement, unconscionability, or lack of authority, it is up to the trial court to resolve such issues and make a clear ruling as to whether or not the agreement is enforceable. Therefore, the trial court must proceed expeditiously to an evidentiary hearing when it faces disputed issues of fact that are material to a party’s motion to compel arbitration; it may not decline to resolve the question until trial of the underlying case. Where material facts are not contested, however, no such evidentiary hearing is required.

*Id.* at \*4, \*6. In *Raines*, factual issues remained on whether the person who executed the arbitration agreement on behalf of the nursing home resident was authorized to do so, and whether the nursing home resident had the capacity to sign the agreement. The appellate court remanded the cause to the trial court for an evidentiary hearing, if necessary, and for the trial court to make findings of fact and conclusions of law on whether the arbitration agreement was enforceable. *Id.* at \*8.

In the case at bar, STAT filed a motion for partial summary judgment, combined with a motion to compel arbitration, taking the position with the trial court, as it does on appeal, that it is entitled to judgment as a matter of law on Elite's claim that it was fraudulently induced to enter into the Contract. The trial court concluded that "STAT [had] not established its right to judgment as a matter of law on [Elite's] fraud in the inducement claim." After making this determination, the trial court denied STAT's second motion to compel.

Under *Raines*, once the trial court found that STAT was not entitled to summary judgment on Elite's claim of fraudulent inducement, at that point it had determined that Elite's "attack[] [on] the agreement [could not] be resolved solely as a matter of law" and "there [was] an issue regarding enforceability." *Id.* at \*4, 6. Thus, Elite's attack on the arbitration agreement "require[d] resolution of factual issues." *Id.* at \*4. Therefore, instead of denying STAT's motion to compel at that point, under *Raines*, the trial court should have held the motion to compel in abeyance and "proceed[ed] expeditiously to an evidentiary hearing [to resolve] disputed issues of fact that are material to [STAT's] motion to compel arbitration." *Id.* at \*6. After the hearing, the trial court should "make a clear ruling as to whether or not the agreement is enforceable." *Id.* If the trial court finds that the agreement is enforceable, it may then go on to decide STAT's motion to compel arbitration.

Thus, we hold that the trial court's decision on STAT's motion to compel arbitration was premature. Consequently, we must vacate the denial of the motion to compel.

STAT asks us on appeal to rule on the denial of its motion for partial summary judgment on Elite's claim of fraudulent inducement. While the denial of a motion to compel arbitration is final and appealable as a matter of right, the denial of a motion for partial summary judgment is not. *See* TENN. R. APP. P. 3(a); *Sheridan Music Group, Inc. v. Bramlett*, No. M2005-01307-COA-R3-CV, 2006 WL 3246121, at \*4 (Tenn. Ct. App. Nov. 8, 2006), *perm. app. denied* Mar. 5, 2007. The trial court's denial of STAT's motion for partial summary judgment was not made final under Rule 54.02 of the Tennessee Rules of Civil Procedure, and STAT was not granted permission for an interlocutory appeal on this issue under Rules 9 or 10 of the Tennessee Rules of Appellate Procedure. Instead, the denial of STAT's motion for summary judgment was simply appealed along with the denial of its motion to compel arbitration.

We find that we are, at this juncture, without jurisdiction to review the trial court's denial of STAT's motion for partial summary judgment. Once the trial court resolves STAT's motion to compel arbitration, any appeal of that ruling would include a review of the trial court's rulings on the enforceability of the arbitration agreement, including whether STAT is entitled to judgment as a matter of law on Elite's fraudulent inducement claim.

Until, however, the motion to compel is properly resolved, the denial of STAT's motion for partial summary judgment is not appealable as of right. *See* TENN. R. APP. P. 3(a); ***Sheridan Music Group, Inc. v. Bramlett***, No. M2005-01307-COA-R3-CV, 2006 WL 3246121, at \*4 (Tenn. Ct. App. Nov. 8, 2006), *perm. app. denied* Mar. 5, 2007.

### CONCLUSION

In sum, we hold that STAT's failure to appeal the denial of its first motion to compel arbitration does not leave this Court without jurisdiction to hear this appeal. Instead of denying STAT's second motion to compel arbitration, the motion to compel should have been held in abeyance for the trial court to determine if the arbitration agreement is enforceable; therefore, we vacate the denial of STAT's motion to compel arbitration and remand for further proceedings. In light of this ruling, we find that we are without jurisdiction at this juncture to review the trial court's denial of STAT's motion for partial summary judgment, and therefore dismiss the appeal of that ruling.

The decision of the trial court is vacated in part, and the appeal is dismissed in part, as set forth above, and the cause is remanded for further proceedings consistent with this Opinion. Costs on appeal are taxed to the Appellant STAT Solutions, LLC and its surety, for which execution may issue if necessary.

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HOLLY M. KIRBY, JUDGE